



United States Department of Agriculture
Rural Development

Rural Business-Cooperative Service • Rural Housing Service • Rural Utilities Service
Washington, DC 20250

March 18, 2002

SUBJECT: Open and Free Competition on Water and Waste Projects

TO: State Directors
Rural Development

ATTENTION: RUS Program Directors
State Engineers

FROM: GARY J. MORGAN /s/
Acting Assistant Administrator
Water and Environmental Programs

Attached is a commentary that provides background and supplemental information on the requirements for applicants to conduct procurements in a manner that provides maximum open and free competition. You may choose to file this commentary with the Rural Utilities Service (RUS) Staff Instruction 1780-2 (available in the Intranet RUS Document Library) for later reference.

We have had recent reports of owners proposing to use specifications and bidding practices that are not consistent with the requirements of RUS Instruction 1780.70(b). RUS is committed to upholding the principles of open and free competition. Rural Development staff will review the applicants' procurement documents for compliance and counsel the applicants in RUS procurement requirements.

Attachments

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Commentary

Maintaining Open and Free Competition under RUS Instruction 1780.70(b) – March 21, 2002

Objective of Instructions: Outline the applicant's requirements for conducting open and free competitive procurements.

Rural Utilities Service (RUS) Instruction 1780.70(b) states, "All procurement transactions, regardless of whether by sealed bids or negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition." The remainder of paragraph (b) and paragraph (d) provides guidance on what may restrict competition and recommends approaches for preparing specifications to maintain competition.

Competition during the procurement process is good for the owner and the government. RUS expects the owner and design engineer to be open to reasonable alternatives during the facility planning and design process. Contractors, manufacturers, and suppliers with acceptable equipment and materials should have a chance to participate in the project. Once the facility requirements have been established that assures good quality, the goal is to construct the project at the best price for the system customers and the taxpayer.

This discussion relating to open and free competition requirements in the procurement process does not diminish the need for the owner to follow all the RUS procurement requirements that require open and free competition. For example, the owner's procurement process must include activities such as publicly advertising the procurement, placing bidding documents with plan services, and taking affirmative steps to assure small, minority, and women businesses are informed of the procurement.

Background: These open and free competition requirements have their roots in OMB Circular A-110 (Exhibit A) and the Grants Management Common Rule and are passed along to individual agencies via the Departmental Regulations 7 CFR 3019 (Exhibit B) and 7 CFR 3016 (Exhibit C), respectively.

RUS is committed to upholding these principles. This commentary addresses two specific issues that could result in practices that are inconsistent with these principles.

[The following paragraphs are numbered only to facilitate easy reference]

1. The first issue deals with the design engineer's preparation of specifications. Specifications should provide a clear description of the technical requirements for the equipment, product, or service to be provided. These technical requirements should be stated in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards. As stated in RUS Instruction 1780.70(d)(1), when it is impractical or uneconomical to

make a clear and accurate description of the technical requirements, the design engineer may use a “brand name or equal” description. Whenever an item of material or equipment is identified on the drawings or specifications by reference to brand name or catalog number, it shall be understood that the reference is made for the purpose of defining the performance or other salient requirements and that other products of equal capacities, quality, or function may be considered. The “brand name or equal” approach should be used to supplement the description of technical requirements, not as a substitute for preparing a description of the technical requirements.

- 1.1 Note that the OMB guidance in paragraph __.43 states that to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids, and/or requests for proposals shall be excluded from competing for such procurements. This restriction should be applied to a contractor/supplier at any tier in the procurement process. This limitation does not preclude manufacturers and suppliers from providing information on their equipment or products to the owner and design engineer.
- 1.2 The use of a specific manufacturer’s equipment or product specifications and adding an “or equal” clause can be problematic if that manufacturer’s description of equipment or product includes features that are patented or copyrighted. A situation is created in which technically there is no “or equal” equipment or materials. If this is the case, the end result is a closed specification, restricted competition, and higher than necessary project costs. RUS Instruction 1780.70(d)(1) requires, “The specific feature of the name brands which must be met by the offeror shall be clearly stated.” This statement is provided not to restrict competition but to inform contractors of the key factors to consider when proposing equals or substitutes.
- 1.3 To maintain competition when the design engineer feels the need to name a specific manufacturer or supplier in the specifications, it is our policy that the design engineer name at least two competitive manufacturers or suppliers of the equipment or product being specified along with an “or equal” or “or approved equal” clause. A proprietary specification is not consistent with open and free competition and should be used only when project requirements are unique, as documented by the design engineer and concurred in by Rural Development, or needed for interchangeability of parts or equipment.
- 1.4 The Engineers Joint Contract Documents Committee (EJCDC), 1997 Funding Agency Edition of the General Conditions article 6.07 states, “If a particular invention, design, process, product, or device is specified in the Contract Documents for use in the performance of the Work and if to the actual knowledge of OWNER or ENGINEER its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by OWNER in the Contract

Documents.” Any requirements for licensing fees or royalties shall be contained in the specifications and instruction to bidders.

2. The second issue deals with restricting competition with the format of the bid form or schedule. The specific troublesome format that has come to our attention recently is often referred to as “base bid with substitutes.” This format has two identifying characteristics: 1) a base bid is requested for a major piece of equipment that names a specific manufacturer, and 2) the format gives the bidder an option to provide one or more substitutes with additive/deductive prices for other specific equipment manufacturers. Some of the problems identified with this format are that often the low bidder is determined by totalling the base bid items, the substitutes are considered only after the contractor is selected, or selection of substitutes may change the apparent low bidder. This type of bid format is not consistent with open and free competition.
 - 2.1 RUS expects the owner and its design engineer to be open during the bidding process to all manufacturers and suppliers that can reasonably meet the technical requirements for the project. The bid format should not include the name of any specific manufacturer or supplier. The technical requirements of the specific equipment items or products should be outlined in the specifications. The terms “or equal” and “substitute” are not interchangeable, and the level of effort to consider “or equal” or “substitute” items is not the same. RUS Bulletin 1780-26 contains guidance on the preparation of instructions to bidders for the EJCDC documents that addresses the consideration of “or equal” and “substitute” items.
 - 2.2 If there are concerns about bidders shopping the suppliers after bid opening, it is entirely appropriate to require the bidder to provide the name of the manufacturer of major equipment items or products as part of the bid. If the bidder does not supply the requested names of manufacturers and suppliers, the bid will be considered non-responsive. The bid can be rejected if the names are not provided as part of the bid submittal. Owners must follow any applicable state laws governing this topic.
 - 2.3 Sometimes the selection of a major equipment item can significantly impact the remainder of the project. It is still important to maintain an environment of open and free competition in these circumstances. In cases like this, it may be best to conduct a “pre-selection” process. Two pre-selection methods can be used. The first method is simply a pre-bid type of competitive negotiation in which manufacturers are requested to submit proposals to the owner on technical merit and prices. The owner and engineer analyze the pre-bids and select the equipment based on price and other factors. The name and price of the major equipment item is included in the construction contract documents used for the competitive bidding of the general contracts. The price of the pre-selected equipment is included in the general contract bid documents to prevent this “pre-selection” process from turning into a sole-source specification.

- 2.4 The second pre-selection method is a phased bid approach in which the major equipment bid is conducted before the general contracts are bid. The first phase would be a competitive bid for the major equipment item based on technical requirements. One of the selection criteria in this phase may include a pilot test to confirm the equipment can perform as required. After the major equipment item manufacturer is selected the project design can be finalized, and the remaining contracts bid competitively. Any first-phase contracts are bid with a hold period sufficient to allow for completing design of the remainder of the project and bidding the remaining contracts with the understanding that the first-phase contract(s) will be assigned to a general contractor when the second-phase contract is awarded. The owner discloses the name and price of the first-phase pre-selected contractor in the second-phase contract bidding documents.

This commentary does not change the roles of any of the key players in the project development process. The owner is responsible for conducting all procurement activities in accordance with RUS requirements and for resolving any disputes that arise from those procurement activities. Rural Development should explain the RUS procurement requirements to the owner and its design engineer and review the bidding documents before authorizing the owner to advertise for bids. During the bidding process and construction period, the design engineer will make any “or equal” or “substitute” determinations in the context of the project design parameters.

By following these procedures the owner and the project design engineer can maintain sufficient control over the project to protect the integrity of the design concept and obtain quality equipment, products and services. The owner will also be in compliance with RUS procurement requirements.

Exhibit A

The following is an excerpt from OMB Circular A-110 regarding open and free competition and procurement procedures:

____.43 Competition. All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

____.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that (1), (2) and (3) apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

Exhibit B

The OMB A-110 guidance is passed along to individual agencies via the Departmental Regulation 7 CFR 3019. The following selected paragraphs discuss full and open competition and methods of procurement:

3019.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interests as well as non-competitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

3019.44 Procurement procedures.

(a) All recipients shall establish writ-ten procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (a)(2), and (a)(3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alter-natives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

Exhibit C

On March 12, 1987, the President directed the Federal grant-making agencies to issue a grants management common rule to adopt government-wide terms and conditions for grants to States and local governments. In 1988, OMB revised Circular A-102 to include guidance to Federal agencies on matters not covered by the grants management common rule. The attachments to Circular A-102 were replaced by the grants management common rule. The following selected paragraphs from the Departmental Regulation 7 CFR 3016.36 are part of the grants management common rule that discuss full and open competition and methods of procurement.

(c) Competition.

(1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of Sec. 3016.36. Some of the situations considered to be restrictive of competition include but are not limited to:

- (i) Placing unreasonable requirements on firms in order for them to qualify to do business,
- (ii) Requiring unnecessary experience and excessive bonding,
- (iii) Noncompetitive pricing practices between firms or between affiliated companies,
- (iv) Noncompetitive awards to consultants that are on retainer contracts,
- (v) Organizational conflicts of interest,
- (vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and
- (vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

- (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical

to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of procurement to be followed.

(1) ...

(2) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in Sec. 3016.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.